

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NINA AGDAL,	.
	.
Plaintiff,	.
	. Case No. 23-cv-16873
vs.	.
	. Newark, New Jersey
DILLON DANIS,	. August 27, 2024
	.
Defendant.	.
	.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings)

2

3 THE COURT: All right. Good afternoon, everybody.
4 This is Judge Hammer.

5 We are on the record in Nina Agdal v. Dillon Danis,
6 Civil No. 23-16873.

7 Who do I have for plaintiff Nina Agdal?

8 MR. SHUMOFSKY: Good afternoon, Your Honor. Joseph
9 Shumofsky on behalf of Nina Agdal.

10 MR. MAYS: Jason Mays on behalf of plaintiff as
11 well.

12 THE COURT: All right.

13 And then how about for Mr. Danis? Mr. Berman?

14 MR. BERMAN: Good afternoon, yes. Good afternoon,
15 Your Honor. It's Mark Berman on behalf of Dillon Danis.

16 THE COURT: All right. Good afternoon.

17 So we're obviously on the record to deal with the
18 letters that were filed August 23rd and August 26th
19 concerning Mr. Danis's, quote/unquote, dead phone.

20 Have the parties had any further discussions about
21 this, since the letters, about which I should be aware?

22 MR. SHUMOFSKY: No, Your Honor.

23 MR. BERMAN: No, Your Honor.

24 THE COURT: All right.

25 So, Mr. Berman, let me ask you. What does it mean

1 the phone died? What does that mean?

2 MR. BERMAN: Well, I can just tell you my
3 understanding, so --

4 THE COURT: Yes. That's all I asked.

5 MR. BERMAN: -- not anyone rely on mine.

6 My understanding is is that the phone was being
7 charged and that it got fried. My understanding is the phone
8 still exists. So if anybody wants to have it examined,
9 that's possible. It hasn't been discarded.

10 THE COURT: Where is it now? Is it with Mr. Danis?

11 MR. BERMAN: It is with Mr. Danis, yeah.

12 THE COURT: Okay. We'll come back to talking about
13 that.

14 Okay. Go ahead. I'm sorry. Continue.

15 MR. BERMAN: And, you know, he's not -- he got a
16 new phone, and whatever -- whatever was on, you know -- and
17 when you get a new -- he had a iPhone. And when you get a
18 new iPhone, whatever happens to the -- whatever settings are
19 set to be backed up were transferred to the new phone, and
20 whatever isn't set to be backed up to the cloud wasn't
21 transferred.

22 So, for example, we produced lots of photographs of
23 plaintiff that were on his phones; right? So he didn't
24 delete those intentionally. So if you were -- I mean, that's
25 why I say that I think the next logical step is for them to

1 depose Dillon Danis so it's not me speaking; it's him
2 speaking.

3 But --

4 THE COURT: Right. No. We'll -- and we're going
5 to get to that. I have some ideas in mind. But go ahead.

6 MR. BERMAN: But just on the issue, oh, he
7 intentionally destroyed his phone, well, if you're doing
8 that, why would I -- why would he have kept pictures of Nina
9 Agdal on his phone? He would have gone all in.

10 So in any event, I -- as I said in my letter, I,
11 obviously, understand the concern. And I wasn't involved.

12 So I think he's the one who should be asked.

13 THE COURT: Of that I'm quite sure that you weren't
14 involved.

15 Let me ask this. How is it -- and, again, this may
16 be a question for his deposition, but -- that he didn't
17 disclose this to anybody -- and you don't have to comment on
18 this, but I'm quite sure, including you -- until August, and
19 notwithstanding all of the letters, the hearings that we had
20 on July 11th that we have to find out about this this late in
21 the game?

22 MR. BERMAN: I think the short answer is -- and --
23 is that -- I don't think he uses text that often, and I don't
24 think it's something -- he's not sophisticated. So he's not
25 thinking about it the way -- he doesn't really understand the

1 whole process, notwithstanding my attempt to help him
2 understand.

3 So that's the only explanation I can give. It's
4 not -- it's just he's not a college graduate. He's not
5 sophisticated. It's not something he's experienced before.
6 And he just -- he just doesn't understand how the process
7 works.

8 THE COURT: Right. Okay.

9 MR. BERMAN: But, again, I guess -- I think that's
10 a better question asked of him rather than my --

11 THE COURT: It's funny you say that, Mark, because
12 as you were answering, I'm like, this really is better
13 question of him -- because at least, as alleged in the
14 complaint and certainly in Sills's, he clearly does text.
15 But, yeah, that could be followed up in any deposition.

16 Let me ask --

17 (Simultaneous conversation)

18 THE COURT: Go ahead. Tell me what you wanted to
19 tell me.

20 MR. BERMAN: Listen, as I said, I understand the
21 concern.

22 The -- if there was intentional spoliation here,
23 well, then there's -- eventually, there's going to be an
24 application. It's not going to change as of -- happening,
25 some inquiry next week as opposed to after his deposition,

1 | like, if I -- you know, why not get him under oath explaining
2 | all this stuff rather than having it come through my partial
3 | understanding. And then everyone can see where things stand,
4 | including, you know, maybe it makes sense to try to
5 | resuscitate that phone, though what my understanding is he
6 | asked the Apple -- you know, he took it to the Apple store or
7 | whatever, and they said it was -- there was nothing that
8 | could be taken from it.

9 | But --

10 | (Simultaneous conversation)

11 | MR. BERMAN: But better he should answer those
12 | questions than I'm answering them. That's for sure.

13 | THE COURT: So let me ask Mr. Shumofsky. The text
14 | messages, obviously, are at least important insofar as they
15 | very possibly would establish -- or be probative at least of
16 | Mr. Danis communicating with, like, Alex Lord and Anthony
17 | Hinchcliffe about plaintiff and posting content related to
18 | plaintiff on social media.

19 | So I get -- at least from a discovery standpoint,
20 | the relevance of the text messages.

21 | But do you have all of the content that you expect
22 | to get from Lord? And then you'll tell me next, if you don't
23 | mind, about the status of the subpoena to Hinchcliffe.

24 | MR. SHUMOFSKY: Sure. The -- as far as, you know,
25 | do we have everything that we have from Lord, you know, I

1 | believe Lord's the one, Your Honor, that said, you know, here
2 | are text messages. There are others, but I don't have them
3 | anymore with the guess that there's others.

4 | In addition, putting aside the status of the
5 | nonparty subpoena to Hinchcliffe, they'd be -- I underscore
6 | the fact that these are nonparty subpoenas, and nonparties
7 | are never as cooperative -- or they're less cooperative
8 | sometimes than the party --

9 | So in this case, with respect to the phone and
10 | putting aside any, you know, spoliation, that's what I was --
11 | we were interested in discussing today.

12 | But with respect to finding other communications,
13 | one of the things that Your Honor made part of the Court's
14 | order on July 11th was that if there were -- you know, it
15 | comes to the Court's attention that there's other
16 | communications that weren't produced, there would be a
17 | forensic vendor at defendant's expense.

18 | So the phone exists. The phone has not been, you
19 | know, destroyed, like run over, that there's something to be
20 | looked at. And it seems that a forensic vendor should be --
21 | I don't know why, if it hasn't been done already, to search
22 | the phone to see what can be happened. And then if there's
23 | nothing -- if there's nothing that can be retrieved, then
24 | okay.

25 | But, you know, to say, to rely on Mr. Danis saying,

1 well, I alleged -- whatever he did, whether it was he checked
2 it, didn't check it, what Apple said is like there are
3 mechanisms in place to see if we can go at those other
4 communications that we know are available. And there could
5 be those and others on Mr. Danis's phone.

6 Certainly, Mr. Danis can answer all sorts of
7 questions about what he did or didn't do. But that's not
8 what we're interested in. We're interested in getting at --
9 getting at those communications and having those
10 communications because then the point of a deposition is that
11 to be armed with whatever communications, discovery, evidence
12 you have and then to question a party about that. There are
13 things short of the deposition -- we shouldn't jump the
14 deposition to sort of try and figure this out. There should
15 be a forensic analysis, if it hasn't already been done, of
16 the phone to see what can be retrieved. If something cannot
17 be retrieved, then we know where we are, and there's nothing
18 else. And separate spoliation applications or whatnot, to
19 the extent they may happen, that's for another day.

20 But that seems to -- that would be something, as we
21 indicate in our letter, Your Honor, what we think should be
22 ordered in this case and this is an extension of what
23 happened on July 11th, where, to come back and find out, did
24 we get everything, seems like we did not.

25 So we'd like a forensic vendor be paid at

1 defendant's expense to search his phone.

2 THE COURT: Has anybody priced out what a forensic
3 vendor would cost to do this sort of analysis?

4 MR. BERMAN: I haven't. This is Mark. I have not.

5 THE COURT: I'm not taking the forensic vendor off
6 the table, but I have to say, Mr. Shumofsky, I'm also not
7 taking off the table the possibility that, notwithstanding,
8 the July 11th order, that the parties split the cost because
9 paragraph 5 of the July 11th order presupposed that plaintiff
10 produced all the documents and discovery in his possession,
11 custody, or control.

12 So far what we have doesn't rise nearly yet to the
13 level at least of spoliation. We have a guy who well before
14 the litigation began, apparently killed his phone. And --

15 (Simultaneous conversation)

16 MR. SHUMOFSKY: Your Honor --

17 (Simultaneous conversation)

18 THE COURT: After the litig- -- let me finish.
19 Sorry.

20 After the litigation had started. But the point is
21 I haven't seen anything yet. And this may very well be borne
22 out by deposition testimony that the phone, quote/unquote,
23 dying or frying or suffer some other ignominious end, at
24 least from what I can see so far, hasn't been through the
25 fault of the plaintiff. And so I don't know yet that there's

1 spoliation. Yes, you could make the argument that he should
2 have been sending that backup to the cloud. But whether that
3 rises to the level of spoliation is certainly a conclusion I
4 am not at all prepared to make.

5 It strikes me that if plaintiff truly wants to see
6 what's on the phone at this point, from a discovery
7 standpoint, and there being no indicia that the defendant is
8 playing games or trying to hide that discovery, that
9 fundamental fairness dictates that the parties split the
10 costs rather than the defendant unilaterally bear all those
11 costs.

12 MR. SHUMOFSKY: Your Honor, the -- I hear what the
13 Court's saying.

14 In this case, this isn't a scenario where it turns
15 out that there was information that were on servers, for
16 example, that were put on backup tapes at a company and then
17 to access these backups tapes are very expensive and so, you
18 know, that the parties should share the costs.

19 This is a scenario where the device that the
20 defendant primarily used to engage in the conduct wasn't
21 searched. And just saying, well, it's died, and there is a
22 mechanism to do that. And defendant hasn't even looked --
23 so, you know, in this case, the -- you know, and there are
24 indicia that -- and, again, I am not talking about
25 spoliation. I'm just talking about obligation. There are

1 indicia here that there are other text messages that would be
2 available, communications that would be available. This is
3 something that should have been done. And defendant came and
4 gave us a certification that says, well, I searched my mobile
5 phone for documents and images.

6 And it was for us to say, well, wait a second.
7 What about communications, something that would be one of the
8 most obvious things that you would expect from a phone and
9 something that plaintiff's counsel has asked for several
10 times, and then we found out, well, the phone died.

11 Well, okay. That happens, whatever that means. We
12 can find out what -- did you figure out? Did you try to
13 investigate? But, independent, defendant should be saying,
14 well, I need to find out, can I get at this? How much will
15 it cost? And to come back and say, well, it's \$100,000 to do
16 this. That seems to be disproportionate to the needs of the
17 case. But if it's \$2,000, that seems to be something that
18 should squarely fall as the defendant -- like this isn't some
19 random piece --

20 THE COURT: Yeah, but you made the application, and
21 you don't have the cost information; so I don't know either.

22 MR. SHUMOFSKY: But all I'm saying, Your Honor, is
23 this seems to be something -- Your Honor, we can get that
24 information.

25 I'm suggesting, respectfully, this is something

1 defendant on their own should be, like, well, they looked
2 into it. They figured out it's this much and this is why as
3 opposed to plaintiff once again chasing after defendant to
4 find, hey, can we get this.

5 I mean, but for the fact that we asked about these
6 communications, we wouldn't have known the phone died. We
7 were only told that, oh, we searched the mobile phone for
8 documents and images. We would -- if he shrugged and weren't
9 doing our job, we wouldn't have known. Everybody would have
10 gone about their business. Defendants --

11 (Simultaneous conversation)

12 THE COURT: -- certainly agree with -- hold on.
13 Here's what I'll certainly agree. It is beyond my reckoning
14 that Mr. Danis waited this long to disclose that the phone,
15 which he surely must have known before -- even before the
16 July 11th hearing, rightfully contained relevant information.
17 It is beyond -- and I understand Mr. Berman's argument that
18 he's not technically sophisticated. But it doesn't make
19 somebody who's technologically sophisticated to understand --
20 once they understand that the adversary wants the text
21 messages, to understand that those are on the phone and,
22 therefore, the absence of the phone is something that should
23 be reported to counsel and the Court.

24 But here's what I'm going to do. One, I want
25 Mr. Danis to provide the phone to Mr. Berman by close of

1 business on Thursday so that Mr. Berman has custody of the
2 phone. I agree with Mr. Berman that before we go into the
3 who pays for the forensic analysis of the phone, that I think
4 it's appropriate for the plaintiff to take the deposition of
5 Mr. Danis so that plaintiff can inquire about the
6 circumstances of the phone and get actual under-oath
7 testimony about the phone's demise, the defendant's efforts
8 to preserve the relevant material before the phone's demise,
9 after the phone's demise. That will provide a much fuller
10 record for consideration of any future action by the Court,
11 including but not limited to whether the defendant should
12 solely bear the cost of any forensic evaluation. I don't see
13 that there's any prejudice to the plaintiff at all because we
14 can easily still pivot to the forensic vendor. It sounds
15 like the issue more isn't the forensic examination as much as
16 allocation of that cost, which I don't know, as I sit here
17 today anyway.

18 Moreover, in the latter part of plaintiff's
19 August 23rd submission, for a variety of reasons, including
20 but not limited to the anticipated proceeding in the Northern
21 District of California to get X to comply with a subpoena as
22 well as -- excuse me -- Ms. Agdal's expected -- delivery at
23 the end of September, plaintiff's already asked the Court to
24 stay the pretrial deadlines and revisit those at a later
25 conference, which I agree is the appropriate thing to do.

1 I raise that now only to point out that not
2 proceeding with the forensic examination immediately causes
3 the plaintiff to prejudice, and I think we'll be informed, at
4 least as to the cost allocation on a more fully developed
5 record, particularly the testimony of Mr. Danis.

6 So the parties will schedule his deposition. I
7 understand that plaintiff is going to have probably a lot of
8 questions for Mr. Danis. So what I am willing to contemplate
9 is two depositions of Mr. Danis: one that goes to the
10 specific circumstances of discovery and the phone; and then a
11 substantive Rule 30(b)(1) deposition that goes to the
12 reliability and damages in the case. Obviously, I'm
13 contemplating that the limited deposition for purposes of
14 Mr. Danis's handling of his discovery obligations and
15 particularly the phone would take place sooner rather than
16 later. And then the substantive deposition, you know, would
17 take place subsequently.

18 But that really is something that, if the parties
19 can agree and work out those dates or if you agree to do
20 something differently that still gets to completing the same
21 tasks, I certainly won't get in the middle and dictate
22 sequencing.

23 MR. SHUMOFSKY: Your Honor.

24 THE COURT: Yes. Just -- I'm sorry. Is this
25 Mr. Berman or Mr. Shumofsky?

1 MR. SHUMOFSKY: Mr. Shumofsky.

2 With respect to the deposition -- separate
3 deposition for the circumstances related to discovery issues.

4 THE COURT: Right.

5 MR. SHUMOFSKY: Considering the Court by that is --
6 and it seems like defense as well -- open to discovery and
7 basically ordering discovery on discovery, prior to the
8 deposition, we'd like to confer internally, but we'd like the
9 opportunity to first issue RFPs or interrogatories related to
10 those issues.

11 THE COURT: No. Why? I mean, just why? Just take
12 the deposition. It's not that complicated.

13 MR. SHUMOFSKY: But -- as an example, Your Honor,
14 it would -- fair -- but if we show up at deposition, like,
15 well, was there a preservation notice that you got
16 independently of that? What did you do? We don't have that
17 document, for example. Like, oh, forget that.

18 So there are -- it's not voluminous. But it's,
19 like, hey, what -- you know, are there documents related to
20 preservation efforts. I don't know if he went to this Apple
21 thing -- whatever efforts he made, whether going to a
22 forensic vendor, Apple store, whatnot -- there are documents
23 that would be relevant to question him contemporaneously at a
24 deposition. And we're not looking to -- you know, it could
25 be short turnaround. I imagine there's not voluminous

1 records related to these issues. But that's why we think
2 it -- I think it would be beneficial because it would
3 expedite what then would happen at deposition itself as
4 opposed to hearing about, well, I did this, I did that, I may
5 have records. We would have those records in advance,
6 Your Honor.

7 THE COURT: Okay.

8 Mr. Berman, what do I say?

9 MR. BERMAN: What do I say? I mean, I am not sure
10 what type of records they're expecting other than the phone.
11 I mean, I don't know what they're -- you know, when you go to
12 the Apple store and you have a broken phone and they tell
13 you, oh, it's broken, you need a new phone, they don't give
14 you a receipt for the old phone. They give you the old phone
15 back. So I am not sure what they're expecting.

16 But I will -- maybe this helps. I am not going to
17 take the position that if they depose Dillon Danis -- I'm --
18 date -- in two weeks, that they're prohibited -- I'm going to
19 prohibit them, I'm going to object to their continuing a
20 deposition on a future date. It seems clear to me that
21 they're at least going to have -- need the opportunity to
22 follow up on things, just given the nature of things.

23 But I really don't know what additional paperwork
24 there is. If there was, I mean, I asked for it, and I didn't
25 receive it. You know -- and I did specifically ask about --

1 | you know, I said to him, well, like, was there any proof that
2 | you went to the Apple store?

3 | He's like, "Well, I bought a new phone. I got a
4 | new phone."

5 | But -- and I was like "With respect to the old
6 | phone."

7 | He's like, "No. You know, I just got a new phone."

8 | So I don't know what -- I don't know what they're
9 | expecting to receive and why -- you know, do they really want
10 | responses to an RFP that says no documents? I just -- just
11 | ask him. And then follow up with the RFPs if you think it
12 | wasn't -- I mean ...

13 | (Simultaneous conversation)

14 | MR. BERMAN: -- along --

15 | (Simultaneous conversation)

16 | MR. SHUMOFSKY: Sorry. Certainly it would save
17 | time, Your Honor, if there was a preservation notice or
18 | whatever records related to preservation.

19 | THE COURT: Wait. But I thought -- there was a
20 | preservation notice, is there not? You had told me --

21 | MR. SHUMOFSKY: That was what -- what was what
22 | plaintiffs gave to Mr. Danis.

23 | THE COURT: Right.

24 | MR. SHUMOFSKY: We're wondering if -- it's
25 | certainly relevant and probative to the extent that he got,

1 independent of that, other preservation notices from counsel
2 or other -- or -- whatever the case may be, did he otherwise
3 notified about the issue, that would be something that he
4 received that would be probative of that.

5 So it's not --

6 (Simultaneous conversation)

7 MR. BERMAN: Here's what I'm going to do. I'm
8 going to send you a redacted copy of my retainer agreement,
9 which is relevant to what you're referring to. That's the
10 only other document I can think of.

11 THE COURT: Mark -- and I don't mean to intrude at
12 all on the attorney-client privilege, but it is fair game in
13 the deposition, when you got, I assume, the preservation
14 letter from Mr. Shumofsky?

15 MR. BERMAN: I mean, as I sit here today, I don't
16 remember, but I believe --

17 (Simultaneous conversation)

18 MR. BERMAN: -- sent.

19 I mean, here, I don't believe retainer agreement is
20 privileged, and my retainer agreement includes a direction to
21 all clients to preserve documents. So you're talking about
22 what's fair game, I'll provide you with a redacted copy of my
23 retainer agreement, and that would be something respond --
24 relevant to what you're asking for. I can't think of
25 anything else, but that would be responsive to the issue of

1 whether he knew he had to preserve information.

2 THE COURT: Okay. All right.

3 So I'm going to deny Mr. Shumofsky's request to
4 serve pre-deposition written discovery requests. I just
5 think, as I said earlier, A, this is straightforward enough
6 and simple enough to where I don't regard -- I think serving
7 either limited written discovery at this point would unduly
8 delay the deposition and lead to further discovery issues
9 that a straightforward deposition of Mr. Danis under oath
10 would, much more likely than not, be able to run to ground,
11 particularly where this deposition, again, is not to get to
12 substantive issues of liability or damages in the case but to
13 the providence of the phone and Mr. Danis's preservation and
14 discovery obligations.

15 Certainly, in the course of taking that deposition,
16 if Mr. Danis represents that he had some related or relevant
17 document, certainly plaintiff's counsel can issue a request
18 for production.

19 Moreover, as Mr. Berman has already agreed, should
20 there be some remaining issue involving documents that
21 requires follow-up to this deposition, the parties also meet
22 and confer. If they can agree on the scheduling of it, then
23 it will proceed. If there's an issue, plaintiff's counsel
24 can come back and raise the issue with the Court.

25 All right. Okay.

1 So I think we've at least, for the time being,
2 addressed that issue.

3 I'm on board for Mr. Shumofsky's proposal to
4 essentially not set new discovery deadlines in light of all
5 that's going on.

6 I assume there's no objection from you, Mr. Berman?

7 MR. BERMAN: No. No objection.

8 THE COURT: And I think there's good cause for
9 that. I mean, the parties are clearly doing their best to
10 move forward with the case, both here and I guess in the
11 Northern District of California.

12 What I propose we do is, one, the parties have
13 scheduled this -- I'll put it -- just -- put a term out, this
14 discovery deposition of Mr. Danis, once that has a date, the
15 parties, let me know of that date, and then we'll set up
16 another status conference shortly thereafter to talk about
17 the appropriate next steps.

18 Does that make fair -- sound fair?

19 MR. BERMAN: Yes.

20 MR. SHUMOFSKY: -- Your Honor.

21 THE COURT: All right. Good.

22 Anything else for plaintiff today?

23 MR. SHUMOFSKY: I think that's it, Your Honor.

24 THE COURT: Mr. Berman?

25 MR. BERMAN: No, Your Honor. Thank you.

1 THE COURT: Okay.

2 One other thing. To try and tamp down on the
3 amount of letters -- I am not faulting counsel at all in this
4 case. I think you've all litigated the case admirably. But
5 in the context of all of the other cases I have, what I'd
6 like to do going forward when issues get raised, rather than
7 letter letter letter letter, I'd like a joint letter, max
8 three double-spaced pages per side. Okay?

9 And I know both of you well enough, Mr. Shumofsky
10 and Mr. Berman, to know that unlike some other cases, the
11 parties speak with each other and have no issue -- or problem
12 doing the joint letter. It just makes it so much easier for
13 the Court to digest everything it needs to know to move
14 forward as efficiently as possible. All right?

15 MR. BERMAN: Yes, Your Honor.

16 MR. SHUMOFSKY: Sure, Your Honor.

17 THE COURT: Great. All right.

18 I'll wait and see what you guys have once the Danis
19 discovery deposition is set. Thank you very much.

20 Hope you all have a great Labor Day weekend.

21 MR. BERMAN: You too. Enjoy, everybody.

22 THE COURT: Thanks, bye.

23 (Conclusion of proceedings)

24

25

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 24 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

4th of September, 2024

Signature of Approved Transcriber

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